IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5850 OF 1988

Shri Dattu Mahadu Labade
age adult, occupation Fitter,
residing at 207, Ganesh Peth,
Pune 411 002 .. Petitioner.

Vs.

Shri Rangnath Baburao Bodake
(since deceased) through LRs.
a) Parvatibai Rangnath Bodek
(Widow) aged, Occupation - Nil ..
b) Ms.Kanta Gorakh Bodake ..
c) Mr.Sunil Rangnath Bodake ..
d) Ms.Sapna Kailas Bodake
Age minor, through Guardian
Shri Sunil Rangnath Bodake ..
e) Mr.Sameer Kailash Bodake
Age minor, through guardian
Shril Sunil Rangnath Bodake
all residing at 296,
Ganesh Peth, Pune - 411 002. .. Respondents.

Mr.R.S.Khadapkar i/b Mr.R.G.Ketkar for the petitioner.
Mr.K.Y.Mandlik for respondent nos.1(a) to 1(e).

CORAM : D.B.BHOSALE, J.

DATED : 18TH AUGUST, 2006

ORAL JUDGMENT:

1. This petition is directed against the judgment and order dated 23.11.1998 rendered by the District Judge, Pune in Civil Appeal No.140/1986 by which the respondent-landlord's appeal has been allowed and the suit for recovery of possession on the ground of arrears of rent as provided for under section 12(3)(a) of the Bombay Rent Act came to be decreed and the

petitioner-defendant has been directed to be evicted and deliver possession of the suit premises to the respondent or or before 1st January, 1989. The petitioner was also directed to pay to the respondents Rs.540.60 Ps. as claimed and cost of the suit and appeal. The suit was filed by the respondent-landlord for eviction on the grounds of arrears of rent and nuisance. The trial Court, however, by its judgment and order dated 19.9.1985 dismissed the suit holding Rs.15/- as the standard rent. In appeal, the learned counsel for the respondent-landlord did not press decree on the ground of nuisance. Similarly, the issue of standard rent was not pressed by the petitioner-tenant hence only the issue that was framed and decided by the appeal court was with regard to ground available under section 12(3)(a) of the Bombay Rent Act.

2. The case set up by the respondent-landlord was that the petitioner-tenant was in arrears of rent for a period of 30 months. In view thereof a demand notice under section 12(2) of the Bombay Rent Act was issued on 22.6.1981. The notice was duly served on the petitioner on 1.7.1981. The petitioner neither replied the notice nor did he make payment of the arrears of rent due and outstanding within the time stipulated from the date of receipt of the notice.

Admittedly, he did not raise any dispute about the standard rent nor did he make an application for fixation of the standard rent. Still the trial Court had framed the issue as to the standard rent of the suit premises and fixed it at the rate of Rs.15/- per month.

3. The appeal Court after appreciating the entire material placed before it decreed the suit holding that the petitioner was in arrears for 30 months and is liable to be evicted on that ground. I am not referring to the reasons recorded by the appeal Court in detail in view of the submissions advanced by the learned counsel for the petitioner and for not taking exception to the reasons recorded in the judgment of the appeal court. As a matter of fact, the learned counsel for the petitioner fairly stated that default in paying rent for 30 months has been proved in the present case. However, the only contention advanced by the learned counsel for the petitioner is that, in the plaint as well as in the notice, the landlord demanded monthly rent as also permitted increases i.e. education cess which was payable on year to year basis and in view thereof the demand notice under section 12(2) itself was invalid. He further stated that no suit on the ground of default could be maintained if it is founded on notice which includes such claim. In

other words, since the notice was inclusive of the education cess, which was payable on year to year basis, the notice under section 12(2) itself was invalid and in view thereof the suit ought to have been dismissed. In support of this contention he placed reliance upon the judgment in **Ramvilas Shivlal Navandar & Others Vs. Biharilal @ C.R.Ray & Others 2002(2) Mh.L.J. 467**. He further submitted that though there is no material on record to show that the educational cess was payable on year to year basis, it is well settled that amount towards permitted increases is essentially payable on year to year basis. My attention was further drawn to the observations made in paragraph 10 of the judgment in **Ramvilas Shivlal's** case (supra) to contend that the Apex Court in the case of **Raju Kakara Shetty Vs. Ramesh Prataprao Shirole and Anr. in (1991) 1 SCC 570** has taken a view that the amount towards education cess would be payable on year to year basis unless there is express agreement between the parties to the contrary. The landlord has failed to bring on record any material which speaks contrary to the settled position in law that the education cess would be payable on year to year basis.

4. Mr.Mandlik, learned counsel for the respondent-landlord on the other hand, submitted that

it is not open to raise such plea for the first time in this Court. Such plea was not either raised in the written statement nor in the course of hearing of the suit or in the appeal. Since no such plea was raised by the plaintiff, he cannot state that the education cess which was demanded in the demand notice under section 12(2) of the Act was payable on year to year basis. As a matter of fact from the contents of the plaint and the notice it is clear that the education cess was payable on month to month basis and, therefore, the landlord was justified in demanding the arrears of monthly rent and education cess. In the alternative, he submitted that even if it is assumed that the education cess was payable on year to year basis still the notice cannot be held to be invalid inasmuch as in the notice, the tenancy was terminated solely on the ground of arrears of monthly rent and not on the grounds of arrears of education cess. After terminating the tenancy on the ground of arrears of rent and demanding the arrears at the rate of Rs.17/- the plaintiff proceeded to demand the arrears of education cess also at the rate of 6 Ps. per rupee and, therefore, the notice cannot be faulted.

5. Except the contentions advanced and recorded by me in foregoing paragraphs the learned counsel for the petitioner did not raise any other contentions.

In view of the submissions of the learned counsel for the petitioner I perused the plaint, written statement and the demand notice under section 12(2) of the Rent Act. In the plaint, in paragraph 2 thereof, the respondent has categorically stated that the petitioner was liable to pay Rs.17/- per month as rent of the tenement and that he was in arrears of rent for the period between 1.1.1979 and 30.6.1981 i.e. 30 months totalling Rs.510/-. It was further stated in the plaint that he was also liable to pay 6 Ps. towards education cess per rupee and thereby he was liable to pay Rs.30.60 Ps. It is no where either in the plaint or in the notice, the respondent has stated that the education cess was either payable on year to year basis or on month to month basis. However, from bare perusal of the pleadings and the notice, there appear to be substance in the submissions of Mr.Mandlik that the education cess was payable on month to month basis and that is why he demanded 6 Ps per rupee, totalling Rs.30.60 Ps. on the basis of the arrears of Rs.510/- for 30 months. Even if it is assumed that the education cess was payable on year to year basis the petitioner ought to have raised such plea either in the written statement or in his evidence before the trial Court. He cannot be allowed to raise such plea for the first time in the writ petition which involves disputed question of facts.

The judgment of this court relied upon by the petitioner in **Ramvilas Shivlal's** case (supra) is of no avail to the petitioner, mainly on the ground that the contention advanced by the petitioner for the first time is essentially the plea of fact which ought to have been taken in the written statement; and, is matter on which the parties were expected to adduce the evidence. As that has not been done, it cannot be assumed that in the light of the facts and circumstances of the case that education cess was payable on year to year basis in absence of the pleadings and averments to that effect. Moreover, the contents of notice are absolutely clear wherein the respondent-landlord had terminated the tenancy of the petitioner mainly on the ground of the arrears of rent for more than six months and I find no reason or ground to hold the said notice invalid. In the circumstances the contentions regarding the ground of default, in my opinion, does not merit any interference. In the result the writ petition stands dismissed with costs.

(D.B.Bhosale, J.)